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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL ANGELO AGUIRRE, Defendant and Appellant.	B200904 (Los Angeles County Super. Ct. No. KA073857)

APPEAL from a judgment of the Superior Court of Los Angeles County. Bruce F. Marrs, Judge. Affirmed.

Charlotte E. Costan, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Robert L. Davis and Steven E. Mercer, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Michael Angelo Aguirre appeals from a judgment entered after a jury convicted him of second degree murder in count 1 (Pen. Code, § 187, subd. (a))[1] and count 2, of attempted murder (§§ 664/187, subd. (a)). The jury found true that appellant personally used and intentionally discharged a firearm that caused great bodily injury and death (§ 12022.53, subds. (b)–(d)). The jury found not true the allegation that appellant committed the crimes for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1)(C).)

The trial court sentenced appellant to state prison for a term of 65 years to life plus two years and four months as follows: count 1, 15 years to life, plus 25 years to life for the firearm enhancement; and count 2, one-third the midterm (two years and four months), plus 25 years to life for the firearm enhancement.

We affirm.

CONTENTIONS

Appellant contends that: (1) prosecutorial error occurred under *Doyle v. Ohio* (1976) 426 U.S. 610, 618 (*Doyle*); (2) the trial court deprived him of due process by allowing a witness to testify that appellant looked like the shooter; and (3) substantial evidence did not support the jury's verdict.

FACTS AND PROCEDURAL HISTORY

Viewing the whole record in the light most favorable to the judgment below as we must (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138–1139), the evidence established the following.

On January 10, 2006, around 9:00 p.m., brothers Alfredo and Robert H., were riding on a single bicycle in La Puente. Alfredo was 15 years old and Robert was 17 years old. Alfredo noticed a 1998 green Ford Explorer parked on Molinar Avenue with its lights off. A man wearing a baseball cap got out of the driver's side of the SUV and approached Alfredo. Alfredo got off the bike. The man ran up to Alfredo and asked

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

where he was from. Before Alfredo could answer, the man shot at Alfredo and Robert about five times.

Kevin Robertson, an off-duty firefighter, was parked in his car when he heard five to seven gunshots. Robertson turned in the direction of the gunfire and saw a man holding a handgun run in front of a white van that had its headlights on. The man then got into the driver's side of a dark Ford Explorer and drove away. Robertson described him as a short Hispanic man with a shaved head, wearing a white shirt and dark pants. Robertson could see that there was someone in the passenger seat, but he could not see his face. Robertson dialed 911 from his cell phone. He found Alfredo sitting against a wall with a gunshot wound to his left side.

Paramedics and police arrived within a few minutes. Alfredo told police that he had been shot and described the shooter as a male Hispanic with a shaved head, about 5 feet 5 inches tall, 120 pounds, and 20 to 25 years old. Alfredo did not identify anyone from a photographic six-pack shown to him later. Robert died at the scene from a gunshot wound to the chest. Because of the gunshot wound he sustained, Alfredo can no longer walk and is confined to a wheelchair.

Los Angeles County Deputy Sheriff Joseph Purcell found four expended .25-caliber shell casings at the scene of the shooting. Several days after the shooting, Robertson identified three men who looked like the shooter from a six-pack photographic lineup.

Wyatt Reneer, a close friend of appellant and his family since childhood, is a civilian jail employee with the El Monte Police Department. Appellant called Reneer on January 12, 2006, asking him whether he knew if appellant was "wanted." Reneer replied in the negative and asked why he wanted to know. Appellant stated that "we did something bad" or "we got into some trouble." Appellant sounded worried and scared, and when Reneer asked him if he had hurt someone, appellant answered, "No, no, it's kind of worse than that." Appellant said that he got out of his car and got in a confrontation with two random kids. He said "I don't know them, but I don't like them."

Appellant said he "hurt two people, one is hurt really bad, the other one he's not sure." When Reneer asked if someone had died, appellant said "I'm not sure. They might be." Appellant told Reneer that he was worried that he might have dropped his cell phone at the scene of the shooting and that he could be linked to a crime. Appellant said that someone drove by and saw him holding the gun, but he ducked down and kept driving. Appellant told Reneer that he had gotten rid of the gun, that he could not be linked to the crime with fingerprints or shell casings, and that he had disposed of the clothes he had been wearing. He asked Reneer if gun residue could be transferred from his hand to a steering wheel. Reneer suggested that appellant turn himself in. Appellant refused to do so and asked Reneer to contact him at a friend's telephone number and let him know whether the news was "good or bad." Reneer knew that appellant's family owned a 2002 Ford Explorer.

Reneer spoke to his father, a sergeant with the El Monte Police Department, about the telephone call he received from appellant. His father called the sheriff's department the next morning and both Reneer and his father were interviewed later that day by Deputy Purcell. At Deputy Purcell's suggestion, Reneer called appellant. Appellant called back and left a message stating "If it's bad, just say it's bad. Or if it's all right, just say it's all right, you know, and I'll know what you mean."

Appellant was arrested on January 27, 2006. After waiving his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), he told Deputy Purcell that he hung out with the Valinda Flats gang, but was not a member of the gang. When questioned, he stated he did not recall calling Reneer after the shooting.

Subsequent investigation revealed that a cellular phone registered to appellant's father had placed two calls from La Puente at about 9:00 p.m. on January 10, 2006, and that appellant's mother reported a lost cellular phone to Verizon on January 11, 2006. Furthermore, appellant's family owned a green Ford Explorer.

At trial, Robertson testified that he could not positively identify the shooter from a photographic lineup but was able to identify two or three men who looked similar to the

shooter. When the prosecutor asked him if he could identify anyone in court who looked similar to the shooter, defense counsel asked for a sidebar, arguing that the question was unduly suggestive. The trial court held that the evidence was admissible, that defense counsel's objections went to weight, and that instructions on witness identification would be given to the jury. Robertson then testified that appellant's face, complexion, and size, was similar to the shooter. Robertson also testified that although there were similarities between the shooter and appellant, he could not positively identify him.

Los Angeles County Deputy Sheriff Steven Keys, a gang expert, testified that the area where the victims were shot is in "no-man's-land" near territory claimed by the Valinda Flats gang. Appellant has a Valinda Flats tattoo. Alfredo was a member of the Aztlan gang, which does not get along with the Valinda Flats gang. Robert was a member of the Perth gang, a clique of the Puente gang, which does not get along with the Valinda Flats gang.

DISCUSSION

I. The prosecutor's questions did not constitute error under *Doyle*

Appellant contends that the prosecutor committed prejudicial error by asking a question at trial designed to elicit appellant's refusal to speak to a police interrogator, in contravention of *Doyle*. We find that appellant has forfeited his challenge by failing to object in the trial court and that in any event, the prosecutor's questions did not constitute *Doyle* error.

Doyle, supra, 426 U.S. at page 618 holds that "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." (Fn. omitted.) In *Doyle*, two defendants invoked their right to remain silent on arrest. They both testified at trial that they had been framed. The cross-examination by the prosecutor asking the defendants why they had not told the frameup story to police upon arrest was held to be fundamentally unfair impeachment because *Miranda* warnings inform a person of his right to remain silent. (*Doyle, supra*, at pp. 618–619.) Similarly, comment which

penalizes exercise of the right to counsel is also prohibited. (*People v. Huggins* (2006) 38 Cal.4th 175, 198 (*Huggins*).) But, failure to object to the introduction of evidence that "defendant implicitly invoked his right to silence by requesting an attorney," forfeits the claim on appeal. (*Ibid.*)

Appellant complains that the prosecutor improperly questioned Deputy Purcell in order to elicit appellant's refusal to speak to police. First, appellant forfeited his claim by failing to object to the challenged question at trial. Second, we disagree that the prosecutor committed *Doyle* error. Deputy Purcell testified that when he advised appellant of his *Miranda* rights, appellant waived his rights and answered questions about his place of residence and gang affiliation. The prosecutor then asked Deputy Purcell if he had questioned appellant about a recent conversation with Reneer. Deputy Purcell testified that "My recollection is that he had. At that point he said he didn't want to be interviewed any further, but I could check in my notes." Deputy Purcell checked his notes and corrected his testimony to state that appellant told him he did not recall talking to Reneer. Thus, the prosecutor did not make an unfair comment about appellant's invocation of his right to silence.

Huggins is instructive. In that case, as the interviewing officers were setting up a tape recorder prior to giving *Miranda* admonitions, they told defendant that he was being questioned in connection with the murder of the victim. The defendant spontaneously admitted that he had escaped from a California Youth Authority work detail, but denied any contact with the victim and then requested a public defender. The formal interview never occurred. The court found no *Doyle* error because the prosecutor "referred to the fact that defendant asked for an attorney only to show that the interview ended after defendant denied any involvement in the victim's death." (*Huggins, supra*, 38 Cal.4th at p. 199; *Anderson v. Charles* (1980) 447 U.S. 404, 408 ["*Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence because a defendant who voluntarily speaks after

receiving *Miranda* warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all"].)

We find that the prosecutor's questions were not designed to elicit appellant's refusal to speak to his police interrogator, as appellant contends. Deputy Purcell's incidental reference to appellant's invocation of his right to remain silent was not used against him by the prosecutor as an admission of guilt, as *Doyle* was meant to prevent. Rather, Officer Purcell merely referred to statements made voluntarily by appellant after he was advised of his *Miranda* rights. We find that appellant forfeited his right to complain about *Doyle* error, and that in any event, no *Doyle* error occurred.

II. The trial court did not err in allowing Robertson to testify whether appellant looked like the shooter

Appellant contends that the prosecutor conducted a suggestive one-man in-court showup by asking Robertson if he could identify anyone in court who looked similar to the shooter. We disagree.

Appellant compares the in-court identification to a one-man showup, complaining that the identification procedure was impermissibly suggestive. (*People v. Clark* (1992) 3 Cal.4th 41, 135–136 [while a one-person showup or one-photo lineup may pose a danger of suggestiveness, such lineups or showups are not necessarily or inherently unfair].) But, "[i]n order to sustain a conviction the identification of the defendant need not be positive. [Citations.] Testimony that a defendant 'resembles' the robber [citation] or 'looks like the same man' [citation] has been held sufficient. The testimony of one witness is sufficient to support a verdict if such testimony is not inherently incredible. [Citation.] The sufficiency of the evidence of identification is generally a question for the trier of the facts. [Citation.] The qualification of identity and lack of positiveness in the testimony of any of the witnesses were matters going to the weight of the evidence and the credibility of the witnesses and were for the observation and consideration of the jury in the first instance and later the trial court upon the motion for new trial. [Citation.]" (*People v. Wiest* (1962) 205 Cal.App.2d 43, 45–46.)

Thus, Robertson's in-court identification of appellant as looking similar to the shooter was sufficient evidence of identity. The qualification of identity and lack of positiveness goes to the weight of the evidence and is a question for the jury to review, as the jury was advised through CALJIC No. 2.92, "Factors to consider in proving identity by eyewitness testimony." We find that the trial court did not err in allowing Robertson to testify that appellant looked similar to the shooter. In light of our conclusion, we reject appellant's further claim that cumulative error deprived him of a fair trial.

III. Substantial evidence supports the jury's verdict

Appellant contends that the evidence was insufficient to support the jury's verdict because the jury's rejection of the gang allegation supported the lack of a motive and the jury's verdict of second degree murder and second degree attempted murder was a rejection of aggravated intent. He also attacks Robertson's testimony regarding the Ford Explorer and the evidentiary value of appellant's telephone call to Reneer. We are satisfied that the evidence was sufficient to support the verdict.

"The role of an appellate court in reviewing the sufficiency of the evidence is limited. The court must 'review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.] [¶] . . . But it is the *jury*, not the appellate court, which must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] Therefore, an appellate court may not substitute its judgment for that of the jury." (*People v. Ceja, supra,* 4 Cal.4th at pp. 1138–1139.)

Reneer testified that appellant made several statements implicating himself in the shooting of the victims, from which the jury could infer that appellant was the shooter. The evidence showed that appellant called Reneer to ask if he was "wanted" by the police. Appellant told Reneer that he had done something bad, something worse than "just" hurting two random kids. Appellant stated that one was hurt really badly and the other might be dead. Appellant said that someone driving by had seen him holding the

gun, but that he had rid himself of it as well as the clothes he wore when the crime was committed. Appellant also expressed fear that he could be linked to the crime scene by his cellular phone or by gun residue on his steering wheel. Alfredo and Robertson both described the shooter as a short Hispanic with a shaved head. They both testified that the shooter ran to a green Ford Explorer. The evidence at trial showed that appellant's family owned a green Ford Explorer. Moreover, Robertson picked out three men from a photographic lineup, including appellant, who resembled the shooter. Robertson also identified appellant as resembling the shooter in court.

Appellant points to purported inconsistencies in Robertson's testimony as to whether the car he saw was a Ford Explorer or a Ford Expedition and to a defense witness's testimony he saw a Ford Expedition at the crime scene. Appellant points to a lack of physical evidence tying appellant to the crimes. He suggests that the not true finding on the gang allegation shows that the People did not prove appellant had a motive to shoot the victims. He contends the finding of second degree murder and attempted murder without a finding that it was willful, deliberate and premeditated, showed lack of intent on behalf of appellant. Appellant dismisses his conversation with Reneer merely as a call "made on behalf of a friend," rather than on his own behalf. But appellant's arguments are merely an invitation for this court to assess witness credibility and reweigh the evidence, which we cannot do. (*People v. Lindberg* (2008) 45 Cal.4th 1, 37–38.)

We are satisfied that as a matter of law, the evidence was sufficient to support the jury's verdicts.

DISPOSITION

The judgment is affirmed.

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_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ